



## **Staff Report**

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### **DISCUSSION AND DIRECTION REGARDING AMENDMENTS TO BELMONT MUNICIPAL CODE SECTION 20.5, REGULATION OF SMOKING**

Honorable Mayor and Council Members:

#### **Summary**

At a recent City Council meeting, a Belmont resident suggested that the City adopt an ordinance to declare secondhand smoke a public nuisance, and to allow a private right of action for citizens to enforce such an ordinance. The resident presented the materials attached hereto as Attachment A-1 in connection with his request. The City Council directed staff to review the materials and return with a possible ordinance for introduction.

After that direction was given, staff received an email from the resident further describing the proposal and attaching information from the State of Utah. These materials are attached hereto as Attachment A-2. Thereafter, the resident submitted additional materials, including copies of various letters, which are attached hereto as Attachment A-3.

In the meantime, staff also received correspondence from other concerned citizens in favor of and in opposition to the proposal. Copies of this correspondence are attached hereto as Attachment B.

After reviewing this and other information, staff determined that it needed further direction from Council prior to drafting an ordinance for introduction. Accordingly, this report requests that the Council discuss the issue, take public input, and provide further direction to staff.

#### **Background**

In 1993, the City added Chapter 20.5 "Regulation of Smoking" to the City's Municipal Code (Attachment C). This Chapter prohibits smoking in places of employment and most public places, including "lobbies, hallways, stairwells and other common areas in apartment buildings, condominiums, senior citizen retirement or residential care houses, nursing homes and other multi-residential facilities and buildings ..." (Section 20.5-3(n)). Under this Chapter, smoking is allowed in certain designated places in bars, hotels, and in private residences. The Chapter allows owners or employees to voluntarily ban smoking in these places. Significantly, violations of the Chapter are specifically declared a public nuisance in Section 20.5-9(e); enforcement mechanisms include a formal complaint to the City Manager, criminal enforcement, and also a private lawsuit under Section 20.5-10.

In the early 1990s, Burlingame, Menlo Park, Foster City, and San Carlos all adopted similar ordinances (see Attachments D-1 – D-4). San Mateo and Woodside adopted ordinances which were somewhat less restrictive, in that they did not prohibit smoking in the common areas of apartment buildings (see Attachments D-5 and D-6).

In 1995, the State adopted Labor Code Section 6404.5, which prohibited smoking in places of employment. A summary of that law is attached as Attachment E-1. Specifically exempted from the law, however, are private residences, except for licensed family day care homes during the hours of operation and in those areas where children are present. Attached as Attachment E-2 is a table which summarizes and compares the provisions of Labor Code Section 6404.5 and the City's smoking regulations in Chapter 20.5. The City's ordinance is more restrictive with respect to smoking in private residences used for the care of others than State law.

In 2004, the State adopted a law prohibiting smoking within twenty feet of main entrances, exits, and operable windows of any public buildings. A summary of this law is attached as Attachment F. This law applies to the City even though there is no similar provision in the Belmont Municipal Code.

Recently, the City of Dublin amended its existing smoking ordinance to 1) limit the definition of smoking to the consumption of tobacco by inhaling, exhaling, burning or carrying any lighted pipe, cigar or cigarette; and 2) to declare secondhand smoke a nuisance. Significantly, the ordinance does not state that secondhand smoke is a public nuisance. The amendment to the Dublin ordinance allows a private citizen to bring a legal action to abate such secondhand smoke as a nuisance. The City made no other changes to its existing smoking ordinance; specifically, the City did not ban smoking in any private residence. The Dublin ordinance, at Section 5.56.050(B)(1), contains a similar prohibition on smoking in public areas of apartments and other multi-unit buildings as is found in the Belmont Municipal Code. Attachment G-1 hereto is a copy of the most recent Dublin ordinance as adopted. Dublin's City Council staff reports have been included in attachment A-1. The minutes of the City Council meeting from Dublin are attached hereto as Attachment G-2.

In 2006, the City of Calabasas adopted a comprehensive secondhand smoke ordinance which is attached hereto as Attachment H. Section 8.12.040 prohibits smoking in public places, places of employment, multi-unit residence common areas, and enclosed and unenclosed places of hotels, businesses, restaurants, bars, and other public accommodations. However, the ordinance specifically allows smoking in private residential properties, including apartments or condominiums. (Section 8.12.040(b)(1).) The ordinance allows a condominium association or an apartment owner to either permit or prohibit smoking in those private residences. The ordinance contains a requirement that smokers refrain from smoking within a "reasonable distance" (defined as twenty feet) from an entrance, opening, crack or vent into an enclosed area in which smoking is prohibited. There are additional stringent requirements prohibiting individuals from

allowing, aiding or abetting illegal smoking, and several provisions for both private and public enforcement.

### **Discussion**

California law describes two types of nuisances: public and private. The rules applicable to each differ in several important respects.

California Civil Code Section 3479 defines a nuisance as follows:

“Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.”

California Civil Code Section 3480 defines a public nuisance as follows:

“A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”

When cities file actions against persons who create a public nuisance, it is not necessary for the City to demonstrate any harm. Harm is conclusively presumed from the mere existence of the public nuisance.

Under California Civil Code Section 3481, a private nuisance is defined as every nuisance not included in the definition of a public nuisance. A person who sues to abate or collect damages for a private nuisance must demonstrate some harm.

California Civil Code Section 3493 allows a private person to maintain an action for a public nuisance if it is “specially injurious” to that person. The term “specially injurious” means an injury which is different in kind, and not just in degree, from that suffered by the public generally.

Applying these principles to the issue of secondhand smoke, people adversely affected by secondhand smoke may currently file a civil action under state law to request abatement and/or damages for a private nuisance, regardless of whether a city has declared secondhand smoke to be a nuisance. In connection with that action, a person would have to demonstrate that he or she suffered some harm. It is not clear whether declaring secondhand smoke a “nuisance”, but not a “public nuisance”, would affect the requirement to demonstrate harm. In contrast, if the City

were to declare secondhand smoke a public nuisance and allow private citizens to sue whenever they were exposed to secondhand smoke, it is unclear whether harm would be presumed or whether the person would still have to prove that the nuisance is "specially injurious" under Civil Code section 3493.

Declaring secondhand smoke a public nuisance could also potentially make property owners, including apartment or condominium owners, as well as homeowners' associations, liable for the smoking behavior of their residents. This is because property owners are responsible under State law for allowing a public nuisance to be maintained on their property, even if the nuisance is being caused by a tenant or occupant of the property. Give this potential liability, owners may have an increased incentive to prohibit smoking in private units and evict tenants who violate that prohibition.

A different approach has been used by the State of Utah, as shown in Attachment A-2. Utah has specifically authorized condominium associations and apartment owners to restrict smoking in private units, common areas and facilities. Utah law authorizes rental contracts to include prohibitions on smoking, and provides that secondhand smoke is a public nuisance subject to private actions for injunctive relief or damages.

If the Council wishes to further regulate smoking, it could do so by amending Chapter 20.5 of the Belmont Municipal Code to include some or all of the provisions found in the Dublin, Calabasas, and/or Utah ordinances.

#### **General Plan Statement/Consistency**

Regulation of smoking is consistent with General Plan policies to protect the public health, safety and welfare of Belmont citizens.

#### **Fiscal Impact**

The fiscal impact of any proposed ordinance amendments would depend on whether the City would be expending resources to enforce the ordinance.

#### **Public Contact**

Posting of City Council agenda.

#### **Conclusion/Recommendation**

Staff recommends that the Council discuss the various alternatives analyzed in the staff report and provide further direction regarding any ordinance amendment.

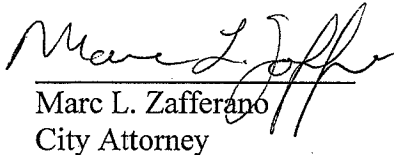
#### **Alternatives**

1. Direct staff to further study the matter;
2. Table the matter at this time.

**Attachments**

- A-1 Materials presented to the Council by a Belmont resident
- A-2 Email and information regarding the State of Utah
- A-3 Additional materials from Belmont resident
- B Correspondence from concerned citizens
- C Belmont Municipal Code Chapter 20.5
- D-1 Burlingame Municipal Code Chapter regarding smoking
- D-2 Menlo Park Municipal Code Chapter regarding smoking
- D-3 Foster City Municipal Code Chapter regarding smoking
- D-4 San Carlos Municipal Code Chapter regarding smoking
- D-5 San Mateo Municipal Code Chapter regarding smoking
- D-6 Woodside Municipal Code Chapter regarding smoking
- E-1 Labor Code Section 6404.5
- E-2 Table comparing Labor Code Section 6404.5 to Belmont Code Chapter 20.5
- F State law passed in 2004 regarding smoking
- G-1 Dublin ordinance regarding secondhand smoke
- G-2 Dublin City Council minutes
- H Calabasas secondhand smoke ordinance

Respectfully submitted,

  
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City Attorney